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ALPHABET INC., GOOGLE LLC, and LOON LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SPACE DATA CORPORATION,

Case No. 5:16-cv-03260-BLF

Plaintiff,

GOOGLE'S SUBMISSION ON INTERPRETATION OF THE NDA

V.

Dept: Courtroom 3 – Fifth Floor
Judge: Hon. Beth Labson Freeman

ALPHABET INC., GOOGLE LLC, and
LOON LLC.

Defendants.

Date Filed: June 13, 2016

Trial Date: August 5, 2019

1 Pursuant to the Court's request at the pretrial conference on July 19, 2019, Defendants
2 Alphabet Inc., Google LLC, and Loon LLC (collectively, "Google"), respectfully submit the
3 following brief on the proper interpretation of the Mutual Confidentiality and Nondisclosure
4 Agreement ("NDA") entered into between Google and Space Data on December 1, 2007.

5 The parties dispute how to interpret Section 7 of the NDA. In full, that section reads:

6 Unless the Parties otherwise agree in writing, a Recipient's duty to protect
7 Confidential Information expires three (3) years from the date of disclosure. A
8 Recipient, upon Discloser's written request, will promptly return or destroy all
9 Confidential Information received from the Discloser, together with all copies.
10 Regardless of whether the Confidential Information is returned or destroyed, the
Recipient may retain an archival copy of the Discloser's Confidential Information
for use solely in the event a dispute arises hereunder and only in connection with
such dispute.

11 The purpose and meaning of this provision is plain on its face. Given the speed with
12 which industry moves and information becomes stale, the parties expected that information more
13 than three years old would not remain sensitive. So after three years had passed, the recipient of
14 any Confidential Information under the NDA would have no further obligations with respect to
15 that Confidential Information. The clause recognized, however, that a party disclosing
16 Confidential Information might believe that it still had current value at the end of the three-year
17 period. Were that the case, the disclosing party had the right to request that its Confidential
18 Information be returned or destroyed, thus preventing the possibility that it would no longer be
19 treated as confidential by the recipient. Google pressed that understanding of Section 7 in its
20 motion to dismiss filed on December 2, 2016 (ECF 46).

21 In response to the motion to dismiss, Space Data posited a novel reading of another
22 portion of the NDA, Section 4. Section 4 reads as follows:

23 The Recipient shall hold in confidence, and shall not disclose to any person outside
24 its organization (other than its affiliates and its and their respective agents,
contractors, representatives or advisors (collectively, "Representatives") who have
25 a need to know such information for the purposes of evaluating the Transaction):
(i) any Confidential Information; (ii) the fact that discussions or negotiations
between the Parties to this Agreement are taking or have taken place; (iii) any of
26 the terms, conditions or other facts with respect to the subject matter of this
Agreement; or (iv) the fact that this Agreement exists or information has been
requested or made available to the Recipient or its Representatives (except that
either Party may make any disclosure otherwise prohibited under clauses (i), (ii),
27 (iii) or (iv) above if, in the opinion of its legal counsel, such disclosure is required

1 by applicable law or stock exchange regulation). The Recipient and its personnel
2 shall use such Confidential Information only for the purposes set forth above. The
3 Recipient will use the same degree of care, but no less than a reasonable degree of
4 care, as the Recipient uses with respect to its own confidential information to: (i)
protect the confidentiality of Confidential Information; and (ii) ensure that proper
and secure storage is provided for all Confidential Information to protect against
theft or unauthorized access.

5 Space Data argued that “the three year ‘duty to protect’ in paragraph 7 is separate and
6 distinct from Google’s obligations not to use or disclose Confidential Information, which survive
7 without expiration,” and that there were “several distinct obligations” in Section 4 of the NDA.
8 ECF 50 at 11. Space Data’s taxonomy included: (1) a “duty to hold information in confidence”;
9 (2) a “duty to use the information only to evaluate a proposed transaction”; (3) a “duty to ‘protect’
10 confidentiality of the information”; and (4) a “duty to ensure secure storage to ‘protect’ against
11 theft or unauthorized access.” *Id.* Space Data contended that the expiration clause in Section 7
12 applied to only “a specific ‘duty’ -- the duty to ‘protect’ (a reference to one or, perhaps, both of
13 the duties to ‘protect’ in Paragraph 4, second (i) and (ii).” *Id.* at 12. Thus, although Space Data
14 claimed that Section 7’s expiration clause applied to only some of the alleged duties that it
15 identified in Section 4, Space Data could not say whether the duty to protect that expired was
16 duty (3) above, duty (4) above, or both.

17 Space Data’s interpretation of Section 7 cannot be unambiguously correct when it isn’t
18 even able to specify what duties are covered by Section 7’s expiration clause. Space Data’s
19 interpretation is also illogical. It would impose on the parties a *perpetual* duty to “hold in
20 confidence” Confidential Information, while at the same time the parties would have no
21 obligation to “protect” that same information after three years had passed. That simply does not
22 square. The NDA cannot, as a logical matter, require a party to “hold in confidence” something
23 that they need not “protect”—much less do so forever. And although Space Data locates all four
24 of these supposed “duties” in Section 4 of the NDA, that section never once uses the word “duty.”

25 Space Data claims that Section 6 of the NDA, which allows for the NDA to survive with
26 respect to Confidential Information disclosed before the date of termination, shows that Google’s
27 interpretation of Section 7 is incorrect. It argues that “there would be no reason for the survival
provisions” of Section 6 if Google were reading the NDA correctly. *Id.* at 13. Not so. The

1 termination provision means that Confidential Information remains subject to protection for a full
2 three years after disclosure (as per Section 7) rather than losing its status as Confidential
3 Information immediately following termination. It also preserves the right of a Discloser to
4 demand the return or destruction of Confidential Information under Section 7 (a right that Space
5 Data has admitted, in response to Google’s request for admissions, that it never exercised). And
6 regardless of whether the Discloser ever exercises its right to demand return or destruction of
7 Confidential Information, the Recipient’s right under Section 8—which reserves to Google the
8 right to use “Residuals” (*i.e.*, “information retained in the unaided memories” of Google
9 personnel) for any purpose—also survives termination of the NDA.

10 Space Data may argue that a Discloser would need both Section 7’s return or destruction
11 of its Confidential Information, as well as Section 4’s perpetual restriction on the scope for use of
12 such information, in order to fully protect it from unauthorized use based on residual memory
13 after return or destruction. But this Residual use is a scenario to which Space Data agreed in
14 Section 8 of the NDA. Accordingly, requesting return or destruction was the only way to
15 preserve any protection for non-Residual Confidential Information that might unexpectedly retain
16 value beyond the negotiated three-year window.

17 In sum, California law requires that “the meaning of a contract must be derived from
18 reading the whole of the contract, with individual provisions interpreted together, in order to give
19 effect to all provisions and to avoid rendering some meaningless.” *Zalkind v. Ceradyne, Inc.*, 194
20 Cal. App. 4th 1010, 1027 (2011) (citations omitted). Google’s interpretation of the expiration
21 provisions in Section 7 carefully accounts for the various terms of the NDA and explains how
22 they function in conjunction with one another. Space Data’s interpretation, on the other hand,
23 leads to nonsensical results, where a party need no longer protect information it must still hold in
24 confidence, and must do so for eternity, even as technology advances and material that was once
25 confidential and sensitive becomes stale and uninteresting.

26 For the foregoing reasons, the Court should interpret the “duty to protect” Confidential
27 Information in Section 7 as encompassing all the obligations under Section 4 of the NDA, which
28 “protect” any aspect of the Confidential Information.

1 Dated: July 22, 2019

Respectfully submitted,

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